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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1008

HENRY A. KISSINGER,

Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

HENRY A. KISSINGER,

Petitioner,

v.

MILITARY AUDIT PROJECT, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL. IN OPPOSITION

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BRIEF FOR RESPONDENTS REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL. IN OPPOSITION

This Brief is submitted by the Reporters Committee for Freedom of the Press and its eleven co-respondents in opposition to Mr. Henry Kissinger's petition for a writ of certiorari.[1]

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[1] In addition to the Reporters Committee, respondents include the American Historical Association, the American Political Science Association, Professors William Leuchtenburg, Clement Vose, James MacGregor Burns, Arthur Link, Austin Ranney and Donald Herzberg, and columnists William Safire, Nat Hentoff and J. Anthony Lukas. Respondents are concurrently cross-petitioning this Court for a writ of certiorari to review the portion of the lower court's decision that was adverse to them.

QUESTIONS PRESENTED

1. Are transcripts of the official telephone conversations of the Secretary of State — prepared expressly to aid him in performing his governmental duties — "records" of the State Department under established property law principles, Department regulations, the Federal Records Act, and regulations promulgated by the General Services Adminsitration under that Act?

2. Do the requirements of the Freedom of Information Act apply to records that were unlawfully removed from State Department custody and remain its property in every respect except physical location and, if so, could the District Court exercise its equitable powers to compel the Department to repossess those records for processing and disclosure under the Act?

3. Could the District Court require Department record officers to review those portions of the transcripts that touch on personal matters in order to insure that all official discussions recorded in the transcripts are identified and screened for possible disclosure under the Freedom of Information Act?

STATEMENT OF THE CASE

Facts

During his eight years as Assistant to the President and Secretary of State, Henry A. Kissinger's secretaries routinely monitored his telephone conversations and recorded their contents either by shorthand or on tape. These rough notes were then transformed into detailed, often verbatim transcripts. The secretaries participating in this process were all government employees; the typewriters and monitoring equipment they employed were owned by the government; and the notes they prepared were transcribed on government time and in government offices. After their

preparation, the notes were retained in the normal course of government business and stored in White House and, later, State Department files.[2]

Mr. Kissinger kept this detailed record of his conversations to assist him and his staff in performing their official responsibilities. He himself has characterized the notes as "work-aids to ease the administrative burdens" of his job (Pet. App. 74a), and acknowledged that they were "prepared, in accordance with routine government practice, in order to facilitate implementation and follow-up of business transacted." JA 47. Moreover, under State Department regulations, "discussions of any significance which are oral in nature", including telephone calls, must be made a matter of record, 5 FAM § 423.2-1, and, during Mr. Kissinger's tenure as Secretary, the Department forbade the monitoring of telephone conversations except when "deemed absolutely essential to the conduct of business." JA 129.

In October 1976, at the close of the Ford Administration, Mr. Kissinger arranged for the removal of the secretarial notes from the State Department to the New York estate of the late Nelson Rockefeller. Pet. App. 76a-77a. Before this action was taken, Department officials responsible for records preservation and archivists of the General Services Administration ("GSA") neither reviewed the notes nor authorized their disposal. Pet. App. 76a. Weeks after their removal, Mr. Kissinger obtained a written opinion of the Department's Legal Adviser that the notes were private papers which he could dispose of as he saw fit. *Id.*

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[2]Second Affidavit of Henry A. Kissinger ("Kissinger Aff."), ¶¶ 3-5, reproduced in the Appendix to Mr. Kissinger's Petition ("Pet. App.") at 73a-75a. The pertinent facts relating to the notes can also be found in the opinion of the District Court, Pet. App. 52a-56a, and in various portions of the Joint Appendix ("JA") filed in the Court of Appeals. *See* JA 91-95, 154-164.

On November 12, 1976, Mr. Kissinger entered into a Deed of Gift and Agreement with the Library of Congress. JA 55-61. By this Agreement, Mr. Kissinger donated to the Library a collection of personal and governmental papers dating from his Harvard University period as well as his years with the government. Except when Mr. Kissinger decides otherwise, the Agreement prohibits public access to these materials until the passage of 25 years or 5 years from his death, whichever is later. JA 57.[3] At the same time, however, the Agreement assures Mr. Kissinger and his research assistants unrestricted use of the collection. JA 58.

On December 24, 1976, Mr. Kissinger and the Library entered into a Second Deed of Gift and Agreement under which Mr. Kissinger donated to the Library the transcribed notes of his telephone conversations as well. JA 61. The Second Agreement incorporates by reference all the terms and conditions of the First Agreement, including its prohibition on public disclosure, and further provides that public access to the notes will be permitted only with the consent, or upon the death, of the other party to the telephone conversation in question.

On December 28, 1976, the notes were transported directly to the Library from the Rockefeller estate. Pet. App. 78a. Soon afterward, in two separate letters, the Archivist of the United States informed Mr. Kissinger that the notes might constitute official State Department records which Mr. Kissinger had no authority to remove. Citing his

[3]At the same time that the First Agreement was executed, a memorandum entitled "Donation Procedures" was prepared which provided for representatives of the Department's Document Center to review Mr. Kissinger's files and remove all Department records for retention by the Department. JA 267-269. However, while Mr. Kissinger's working files were reviewed by Department records officers pursuant to this memorandum, the notes of his telephone conversations remained at the Rockefeller estate and, thus, were never subjected to the same inspection as Mr. Kissinger's working files. As a result, the Department had no opportunity to identify notes of conversations that it wanted to preserve.

statutory responsibility to oversee the preservation of historic federal records, the Archivist asked Mr. Kissinger to permit GSA archivists to inspect the notes in order to ascertain their proper owner. JA 62-63, 108-122. On each occasion, Mr. Kissinger rejected the Archivist's proposal.

Proceedings In the Courts Below

In early 1976, while the notes remained in Department custody, respondent William Safire unsuccessfully sought access under the Freedom of Information Act ("FOIA") to the transcripts of certain conversations between Mr. Kissinger and other government officials. JA 173-178. Then, on January 13, 1977, after the notes had been transferred to the Library, the eleven other respondents filed an unsuccessful FOIA request with the Department that encompassed the notes in their entirety. JA 71-74, 75-77. Soon thereafter, respondents filed suit in the District Court, seeking an order requiring the Department to repossess the notes and review them for disclosure in accordance with the FOIA.

On December 8, 1977, Judge John Lewis Smith issued an Opinion ruling on the parties' cross-motions for summary judgment.[4] That Opinion emphasized that "State Department regulations require documentation of all official activities", including telephone conversations, and that the

[4]The government defendants initially opposed these motions and filed a motion for the production of documents which, if granted, would have allowed GSA and State Department archivists to inspect the notes. JA 190-92. Subsequently, however, the government defendants and Mr. Kissinger entered into an agreement which provided for the inspection of selected samples of the notes. The government defendants thereupon withdrew their opposition to Mr. Kissinger's summary judgment motion on the ground that their interests were adequately protected by the inspection agreement. JA 274-279. Nevertheless, they made no concession that the notes were no longer State Department records or that their removal from Department custody had been lawful.

"significance of the commitments, decisions, and discussions embodied in [Mr. Kissinger's] conversations is apparent from the stature of the other parties to them." Pet. App. 56a. The Opinion then invoked the established doctrine that "work created by an employee within the scope of employment is the property of the employer". Pet. App. 56a-57a. Based on this doctrine, it held that, "having been prepared and transcribed 'in the discharge of his official duties', the notes are property" of the Department of State which Mr. Kissinger had "wrongfully removed" from Department custody. Pet. App. 58a. Since the notes had never ceased to be "records" of the Department, Judge Smith further held that he would exercise the equitable powers granted the district courts as the "enforcement arm" of the FOIA and return the notes to the Department for review and disclosure in accordance with the Act. Pet. App. 55a.[5]

To implement his Opinion, Judge Smith issued an Order on January 25, 1978 which directs the Department to repossess the notes of Mr. Kissinger's conversations as Secretary of State and determine which portions are subject to mandatory FOIA disclosure and which may be withheld under the FOIA's exemptions. Pet. App. 59a-61a.[6] Transcripts which the Department decides to disclose must then be inspected by Mr. Kissinger, who can ask the district court to restrain disclosure on the basis of FOIA exemption

[5]Respondents' original FOIA requests and Complaint encompassed the notes of Mr. Kissinger's conversations as Special Assistant to the President. Referring to these notes only in passing, however, Judge Smith's Opinion commented that respondents had withdrawn their claim to them at oral argument. Pet. App. 55a. After the Opinion was issued, respondents promptly moved for clarification, pointing out that, according to the transcript, Judge Smith's recollection of oral argument was in error.

[6]Without further comment, this Order also denies plaintiffs' motion for summary judgment insofar as it concerned the notes of Mr. Kissinger's White House conversations.

(b)(6), which applies to agency records whose release would "constitute a clearly unwarranted invasion of personal privacy."

Mr. Kissinger, but not the government defendants, appealed from the District Court's Order to the Court of Appeals.[7] On November 7, 1978, the Court issued a *per curiam* Judgment affirming the decision of the District Court. In a brief accompanying Memorandum, the Court stated that, because the government had not appealed, "a judgment affirming the District Court on the ownership issue may make consideration of most of the other issues Mr. Kissinger raises unnecessary." Nevertheless, the Court emphasized that it was "in full agreement on all issues" with the decision of the District Court. Pet. App. 49a.[8]

[7]In the Court of Appeals, the government chose to participate as an amicus curiae. Contrary to the impression created by Mr. Kissinger's Petition, the government's brief did not support his position but, instead, presented a legal analysis which, if accepted, would have required the case to be remanded for further proceedings.

[8]The Court also affirmed the District Court insofar as it had refused relief concerning those portions of the notes which reflected Mr. Kissinger's telephone conversations as Assistant to the President. Pet. App. 49a. The Court's rationale for this holding is described in the separate Cross-Petition for a Writ of Certiorari which the Reporters Committee and its co-respondents are concurrently filing with the Court in order to obtain review of this aspect of the lower court's decision.

REASONS FOR DENYING THE WRIT

A. The Lower Courts Correctly Determined That The Notes Were State Department "Records" That Mr. Kissinger Had Unlawfully Removed

The district court's decision rested on the basic doctrine that materials generated in the course of a government employee's official duties belong to the government agency for which they were produced, not the individual employee. This doctrine is embedded in a large and long-standing body of case law. It is also embedded in the very State Department regulations on which Mr. Kissinger purports to rely, the Federal Records Act, and the government-wide regulations that GSA has promulgated under that Act. Under the Federal Records Act, official records can only be removed from government custody if the originating agency and GSA concur that they are no longer needed for the transaction of public business. Removal of official records at the whim of a retiring employee is an overt violation of the procedure for records disposition prescribed by Congress.

1. In the private sector, it is well-established that an employer is the owner of a work created by his employees within the scope of their employment. *E.g., Scherr* v. *Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert denied*, 397 U.S. 936 (1970); *Brattleboro Publishing Co.* v. *Winmill Publishing Corp.*, 369 F.2d 565, 567-58 (2d Cir, 1966); *Nelson* v. *Radio Corporation of America, Inc.*, 148 F. Supp. 1, 3 (S.D. Fla. 1957). As numerous decisions recognize, the considerations underlying this doctrine apply with even greater force to public employment, where the work product of employees may often have major significance for society as a whole.

In *United States* v. *First Trust Co. of St. Paul*, 251 F.2d 686, 688 (8th Cir. 1958), for example, the court held that, if

materials "are the written records of a government officer executed in the discharge of his official duties, they are public documents and ownership is in the United States." More recently, in a case involving the materials of Richard Nixon's presidency, the District Court for the District of Columbia re-affirmed the "general principle of law that that which is generated, created, produced or kept by a public official in the administration and performance of the powers and duties of a public office belongs to the government and may not be considered the private property of the individual." *Nixon* v. *Sampson*, 389 F. Supp. 107, 133 (D.D.C. 1975), *stayed sub nom. Nixon* v. *Richey*, 513 F.2d 430, *dismissed as moot*, 437 F. Supp. 654, *rev'd. and remanded*, No. 77-2123 (D.C. Cir. December 21, 1978). *See also Sawyer* v. *Crowell Publishing Co.*, 46 F. Supp. 471 (S.D.N.Y. 1942), *aff'd.* 142 F.2d 497 (2d Cir. 1944), *cert. denied*, 323 U.S. 735 (1944).

Reflecting these basic principles is *Public Affairs Associates, Inc.* v. *Rickover*, 268 F. Supp. 444 (D.D.C. 1967), a case where Admiral Rickover sought to prevent the publication of certain speeches without his permission on the basis that they were his own property. After the district court and the court of appeals had decided the case on narrow grounds of copyright law, this Court granted certiorari and, in remanding for further proceedings, emphasized that the case presented

> ". . . matters of serious public concern. They relate to claims to intellectual property arising out of public employment. They thus raise questions touching the responsibilities and immunities of those engaged in public service, particularly high officers, and the rightful demands of the government and the public upon those serving it." 369 U.S. at 112-113.

The Court directed the District Court to determine "the circumstances of the preparation and of the delivery of the

speeches in controversy in relation to the Vice-Admiral's official duties." *Id.* Obeying this directive, the District Court held on remand that "[t]he fundamental determination . . . is whether the disputed speeches fall within the purview of Admiral Rickover's official duties," 268 F. Supp. at 448, and "[i]n this context, the duties of a high Government official should not be narrowly interpreted." 268 F. Supp. at 448-49. Applying this test, the court ultimately upheld the Admiral's claim of ownership only because the "speeches were handled as a private business from start to finish." 268 F. Supp. at 449.[9]

That the notes of Mr. Kissinger's telephone conversations must be considered official records under these decisions is beyond dispute. The notes were produced by government employees on government time and with government equipment; under Department policy, the monitoring of telephone conversations conducted by these employees was permissible only when essential for the conduct of official business. In addition, the express purpose for the creation of the notes was to assist an important government official in performing his official duties. Most importantly, the notes represent Henry Kissinger's conversations on official business — with foreign diplomats, other officials of the Executive Branch concerned with foreign policy, the President and fellow Cabinet members, and members of Congress — while conducting America's foreign policy for eight years. It is impossible to imagine conversations which more directly reflect the official business of the Nation.

[9]As the court emphasized, the speeches were written at the Admiral's home during his leisure time, he was not on duty or acting as a government representative when giving the speeches, they were delivered before private audiences, and the speeches themselves purported to reflect Admiral Rickover's personal views, not official government policy, and often covered topics unrelated to his government responsibilities. *Id.*

2. Throughout this litigation, Mr. Kissinger has insisted that, under State Department regulations, documents generated during a government employee's official duties will be treated as private property merely because he has filed them as "personal" when they were prepared. This extraordinary theory is directly contradicted by the very Department regulations on which Mr. Kissinger relies.

5 FAM § 432 provides as follows:

> "*Papers of a personal character which pertain only to an individual's private affairs* and which are kept in the office of a Departmental or post employee are to be clearly designated as personal. They are to be filed separately from the official records at the office at all times." (Emphasis added).

Under this provision, Department employees may designate documents "personal" only if they are "papers of a personal character which pertain only to an individual's private affairs." If documents do not fit this description, personal designation is improper and, under 5 FAM §417.1(a), the documents may not be removed from Department custody when the employee resigns.[10]

Any other interpretation of 5 FAM § 417.1(a) would be in direct conflict with other Department regulations. For example, 5 FAM § 417.1(c) provides as follows:

> "Unclassified documents *relating to the performance of an employee's official duties* may be

[10]This provision requires as follows:

> "No papers kept in an employee's office that have not been explicitly designated or filed as personal at the time of origin or receipt may be removed from the Department or a post when the employee resigns, transfers to another Federal agency, or is otherwise separated from the Department or the Foreign Service, or at any other time, without the approval of the Director, Foreign Affairs Document and Reference Center."

> copied and privately retained by an employee if approved by the Director, Foreign Affairs Document and Reference Center." (Emphasis added).

If documents "relating to the performance of an employee's official duties" could be removed merely by designating them "personal," then this provision — which requires official authorization before *copies* of such records can be removed — would be meaningless. Similarly, under 5 FAM § 432, even when documents have been properly designated and filed as personal, retiring employees must extract and leave in Department files *all* portions of those documents that pertain to official business:

> "When official policy matters are discussed in personal correspondence, that portion *pertaining to functions or activities of the Department* or a post is to be extracted and made a part of the official records." (Emphasis added).

Under this extracting requirement, *any* portion of a document which concerns the affairs of the Department must remain in its files.

Even more overtly inconsistent with Mr. Kissinger's interpretation of Department regulations is 5 FAM § 417.2, which requires all departing Department officials to sign a form designated "JF-3."[11] This form requires the retiring employee to attest that he has "surrendered to responsible officials all unclassified documents and papers *relating to the official business of the Government* acquired by [him] while in the employ of the Department. . . ." (Emphasis added). The form also requires the departing official to confirm that he has not retained any "documents or material containing classified or administratively controlled information," including any "diaries, memorandums of conversations, or other documents of a personal nature."

[11]The copy of this form signed by Mr. Kissinger is Tab 2 to the Memorandum entitled "Donation Procedures," which is attached to the Second Affidavit of Henry A. Kissinger and was filed in support of Mr. Kissinger's motion for summary judgment in the District Court. This attachment does not accompany the version of the affidavit that appears in the Joint Appendix but is included in the complete record of proceedings in the District Court.

Finally, FAM § 423.2-1 specifically directs Department employees to create a full record of every telephone conversation "of any significance" and, thus, affirmatively categorizes the notes as official records. While Mr. Kissinger has argued that other materials in Department files contain a full record of his telephone conversations, he has never presented any evidence that, apart from the notes, he kept *any* systematic record of those conversations — much less the comprehensive record that 5 FAM §423.2-1 requires.[12]

[12]The only documents now in Department files that even arguably satisfy Section 423.2-1 are the extracts of the notes that were prepared by Lawrence Eagleburger, an aide to Mr. Kissinger, after their removal from Department custody. There are several reasons, however, why these extracts do not represent all of the official records which the Department was entitled to retain.

First, under 5 FAM § 432, extracting is only permissible in the first place for "papers of a personal character." Accordingly, if "extracts" were to be prepared, it was for Mr. Kissinger's personal files, not the Department's. More importantly, 5 FAM § 432 provides that, where appropriate, such extracting must encompass all materials "pertaining to the functions of all activities of the Department," while 5 FAM 423.2-1 requires the documentation of all conversations "of any significance." The extracts prepared by Mr. Eagleburger, however, clearly comprise but a small fraction of the official conversations in which Mr. Kissinger participated.

According to the affidavit of Mr. Monroe Leigh, the Department's Legal Adviser during Mr. Kissinger's service as Secretary of State, Mr. Eagleburger was instructed to extract only those portions of the notes which "contain any significant policy decisions or actions not otherwise reflected in the Department's records." Leigh Aff. ¶ 5 (JA 271). This standard would not include Mr. Kissinger's conversations with foreign and domestic officials in which no "policy decisions" were made or no

3. Although no Department regulation classifies the notes as personal records, Mr. Kissinger strenuously asserts that the Department "determined" that they had this status and that the lower courts erred in failing to defer to that "determination." This argument is unpersuasive for several reasons.

First, the Department's denials of respondents' FOIA requests merely assert, without any analysis or reasoning, that the notes are not official records. Moreover, both those denials and the Legal Adviser's opinions were issued weeks after the notes had already been removed, and, thus, must be discounted as the attempts of subordinate Department employees to provide a *post hoc* legal justification for decisions that the Department's head had already implemented.

If the Department had formally "determined" that the notes were Mr. Kissinger's personal property, one would expect the Department to defend its position in the courts. However, throughout this litigation, the Department has *never* suggested that Mr. Kissinger's construction of its regulations is correct. Indeed, the Department has studiously disassociated itself from Mr. Kissinger's position altogether. When an agency refuses to defend the "determinations" that a private party insists that it made, there is no reason why those determinations should receive any deference from a reviewing court.

Most importantly, while a "reasonable" interpretation of agency regulations may be entitled to deference, no agency

official "actions" were taken. Moreover, even if a conversation contained a "policy decision" or "action," it still would not be reflected in an extract if Mr. Eagleburger determined that it was not "significant." Finally, even if a conversation recorded a policy decision or action that was significant, an extract still might not have been prepared if it was determined — again in Mr. Eagleburger's subjective judgment — that the decision or action was "otherwise reflected in the Department's records."

has any authority to *violate* its regulations. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). This rule applies with special force when agency record-keeping determinations receive judicial scrutiny in suits under the FOIA. Paragraph (a)(4)(B) of the Act provides that, when agency records are withheld, the courts shall "determine the matter *de novo*." In view of this requirement, an agency's determination that documents generated by its employees are not "records" to which the FOIA applies should receive the closest examination from the courts and, when that determination deviates from the agency's own regulations, it should be totally disregarded.

4. Even if the notes were not Department records under its own regulations, they would have that status under the Federal Records Act, which establishes a comprehensive system of records management under the supervision of the General Services Administration. At 44 U.S.C. § 3301, the Act defines "records" of the United States to include:

> "[A]ll books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government . . . *in connection with the transaction of public business* and preserved or appropriate for preservation. . . as *evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government* or because of the informational value of data in them. . . ." (Emphasis added).

This definition of "records" is comprehensive. It clearly encompasses the notes, which were prepared "in connection with the transaction" of Mr. Kissinger's official duties and reflect the "policies, decisions, procedures, operations, or other activities" of the government while he was a public official.

Mr. Kissinger, however, argues that an agency is free under 44 U.S.C. § 3301 to reclassify a category of documents pertaining to official business as the "personal" property of individual agency employees, who may then remove such documents from agency custody without further authorization. This argument rests on a basic misconception of the procedure that Congress has chosen for determining how documents pertaining to official business will be discarded by the agencies that originate them.

44 U.S.C. § 3303 provides that, pursuant to regulations issued by GSA, each federal agency must compile and then submit to GSA schedules of all records that it believes are "not needed by it in the transaction of its current business and do not appear to have sufficient administrative, legal, research or other value to warrant their further preservation by government." Under 44 U.S.C. § 3303a, if the Administrator agrees that the records lack sufficient value to warrant their preservation, he may authorize the agency to dispose of them. However, when the Administrator has decided that records should be preserved, they will be stored in the facilities of the National Archives system, created by 44 U.S.C. §§ 2903, 2907, where they will remain available to the government and the general public.

These procedures for record disposition are plainly based on the premise that one agency, GSA, will have ultimate responsibility for determining which records have sufficient historical or other value to be preserved. In fact, 44 U.S.C. § 3314 expressly provides that "[t]he procedures prescribed by this chapter are exclusive, and records of the United States government may not be alienated or destroyed except under this chapter." GSA's government-wide authority over records disposition would be wholly subverted if, under the guise of redefining the term "records," individual agencies allowed employees to remove all files that they designated "personal." In this event, valuable and sensitive documents could be removed from government

custody simply because an individual official had the foresight to place them in a separate file, and agency record officers and GSA archivists would have no opportunity to determine whether retention of those documents would benefit either the government or the public at large.

For these reasons, the only construction of 44 U.S.C. § 3301 consistent with the effective operation of the Federal Records Act is to treat as "records" *all* documents created "in connection with the transaction of official business." Once materials fit this description, it should then be the function of agency record officers and GSA archivists to review the documents and determine whether they are "appropriate for preservation." Since the secretarial notes have never received this review, their removal from State Department custody was plainly unlawful.

5. There may be times when, for administrative reasons, it is desirable to exempt certain classes of documents from the definition of records in 44 U.S.C. § 3301, thereby permitting their disposal without agency or GSA review. However, the power to grant such exemptions resides solely with GSA, and GSA has not exercised that power here.

As amended, 44 U.S.C. § 2904 expressly authorizes the Administrator of GSA to "promulgate standards, procedures, and guidelines with respect to records management." Moreover, under 44 U.S.C. § 2905, the Administrator is required to "establish standards for the selective retention of records of continuing value." As the legislative history of the Act succinctly states, "[t]he heads of the federal agencies . . . would be *required* to observe standards and principles laid down by the Administrator of General Services within his authority." Cong. Rec. S.11253 (1950) (emphasis added).[13] Thus, GSA regulations

[13]GSA's power to prescribe uniform record-retention standards for all federal agencies is evident in other provisions of the Federal Records Act. 44 U.S.C. § 3105 requires each federal agency to establish

distinguishing between "official" and "personal" documents are binding throughout the federal government and will override contrary regulations that individual agencies may adopt.

GSA regulations provide that documents will fall outside the broad definition of records in 44 U.S.C. § 3301 only when they are "papers of a private or non-official character which pertain only to an individual's personal affairs" 41 C.F.R. § 101-11.202-2(d). Moreover, GSA has emphasized that the "definition of personal papers covers materials pertaining solely to an individual's private affairs." Accordingly, GSA has advised, "correspondence designated 'personal', 'confidential', or 'private', etc., but relevant to the conduct of public business, is nonetheless an official record subject to the provisions of federal law pertinent to the maintenance and disposal of such records." According to GSA, "official records are public records and belong to the office rather than the officer." GSA Bulletin FPMR-B-65, JA 167.

The standards for records maintenance prescribed by these regulations are no different from the standards contained in regulations of the Department of State. But were there any conflict, the Department's regulations would necessarily have to yield to the government-wide definition of "official records" promulgated by GSA — and, under this definition, the notes of Mr. Kissinger's telephone conversations plainly constitute records of the Department of State.

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safeguards against the removal or loss of records. Significantly, these safeguards must include all procedures "required by regulations of the Administrator of General Services." Similarly, 44 U.S.C. § 3102 requires each federal agency to establish an "active, continuing program for the economical and efficient management of the records of the agency." This program, too, must be in compliance with all regulations that the Administrator has issued. 44 U.S.C. § 3102(3).

B. Judge Smith Properly Exercised His Equitable Powers To Compel The Return Of The Notes To The Department Of State

Since the notes were unlawfully removed from the Department of State, they have never ceased to be Department "records" and, if they had remained in the Department's possession, they would still be subject to disclosure under the FOIA. Mr. Kissinger argues, however, that once the notes left the Department's physical custody, the FOIA ceased to apply. As the Court of Appeals determined, Mr. Kissinger lacks standing to raise this issue. Moreover, his position is in any event too insubstantial to warrant review by this Court.

1. When Mr. Kissinger "donated" the notes to the Library of Congress, he surrendered his claim of ownership to the United States. JA 61. Thus, the order of the District Court does not deprive Mr. Kissinger of his property; it merely requires documents owned by the United States to be transferred from one governmental body, the Library of Congress, to another, the Department of State, in order to facilitate review and processing under the FOIA.

Mr. Kissinger challenges that transfer on the ground that the Library of Congress is not an "agency" to which the FOIA applies and, hence, the notes are no longer subject to the District Court's remedial powers under the Act. This argument, however, relates not to Mr. Kissinger's interests as a private citizen, but to the interests of the governmental bodies who are required to comply with the order of the district court. These bodies did not appeal the district court's decision and, thus, acquiesced in Judge Smith's interpretation of their duties under the FOIA. It makes no sense to allow Mr. Kissinger to challenge that interpretation when the real parties in interest do not quarrel with it and have elected to perform the relief ordered by the lower court.

2. Even if Mr. Kissinger had standing to challenge the relief granted by the district court, the issue he seeks to raise would still be insubstantial.

Under the FOIA, federal agencies have an affirmative responsibility to produce all agency "records" requested by members of the public. 5 U.S.C. § 552(a)(3). The only records exempt from this responsibility are the nine narrow classes of documents specified in subsection (b) of the Act. To insure the fullest possible disclosure of agency records, subsection (c) emphasizes that the Act "does not authorize withholding of information or limit the availability of records to the public except as specifically stated" in these exemptions.

There is, of course, no provision of the Act which relieves an agency from disclosing documents which are agency "records" but happen to be outside the agency's physical custody. In the absence of a specific exemption for such documents, the broad disclosure duty mandated by subsection (c) should therefore apply. This conclusion is not undermined, as Mr. Kissinger suggests, by paragraph (a)(4)(B) of the Act, which authorizes the district courts "to order the production of any agency records improperly withheld from the complainant." Official records that the agency owns but declines to disclose can clearly be described as "improperly withheld" whether or not they happen to be stored on agency premises. Thus, a failure to retrieve and produce such records after they have been unlawfully removed from agency property should be treated no differently from any other violation of the Act.

Even more conclusive than the statutory language is the legislative history of the Freedom of Information Act. The FOIA was enacted for the explicit purpose of eliminating the discretion that agency officials possessed under prior law to suppress selected documents that were politically or personally sensitive. As the Senate Report explains the

rationale for subsection (c) of the Act: "[t]he purpose of the subsection is to make it clear beyond a doubt that *all materials* of the government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in Section 3." S. Rep. No. 1219, 88th Cong., 2d Sess., at 2 (1964) (emphasis in original). Mindful of these Congressional purposes, this Court has emphasized that the FOIA is "broadly conceived." According to the Court, Congress sought "to permit access to official information long shielded unnecessarily from public view and attempt[ed] to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973).

The broad disclosure responsibilities imposed by the Act could be easily evaded if the Act ceased to apply as soon as agency records left the physical custody of the agency. Agency employees could simply take home or store with friends documents that they considered politically sensitive or personally embarrassing. Similarly, such documents could be transferred to sister branches of the government, like the Library of Congress, to which the Act does not apply. Exactly as Mr. Kissinger has done here, stringent restrictions on access could then be imposed which shield important governmental activities from public view. Agency officials, unwilling to take action against offending employees or perhaps relieved that damaging information had been suppressed, could simply stand by idly without attempting to retrieve the documents that had been improperly removed from agency custody.

The lower courts have consistently recognized that the applicability of the FOIA turns not on whether documents are within the physical custody of an agency but, instead, on whether they are agency records and remain agency

property despite their location.[14] In *Ciba-Geigy Corp. v. Mathews*, 428 F. Supp. 523 (S.D.N.Y. 1977), for example, the court held "that the goals and purposes of the Act would be served best by imposing a standard which calls for proof that the records were either Government-owned *or* subject to substantial Government control or use." 428 F. Supp. at 529 (emphasis added). This test clearly presupposes that records *owned* by a government agency are covered by the Act even if they are not subject to the agency's physical control. Similarly, in *Tax Reform Research Group v. I.R.S.*, 419 F. Supp. 415, 419 (D.D.C. 1976), the court held that the fact "[t]hat the agency may no longer be in physical possession of the records . . . is not determinative . . . if the agency knows what records a given request is directed towards, knows where those records are located, and is able to produce them."[15]

[14]Mr. Kissinger relies on authorities which indicate that an agency has no duty to create records which do not exist or procure documents that it does not own in response to an FOIA request. *See* Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, 23-24 (1967); Nichols v. United States, 325 F. Supp. 130, 137 (D. Kan. 1971) *aff'd*, 460 F.2d, 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972); N.L.R.B. v. Sears Roebuck & Co., 421 U.S. 132 (1975).

These authorities are irrelevant. Respondents do not seek documents which do not now exist, or which have never been agency property, or which the agency has lawfully relinquished to a private party. Instead, they seek pre-existing documents which remain Department records in every respect but physical location and, but for their unlawful removal from agency custody, would plainly be subject to FOIA disclosure. In this situation, the agency retains an enforceable property interest in the documents and, in the terminology of the authorities cited by Mr. Kissinger, is in a position to exercise "control" over those documents even if they are outside its physical "custody."

[15]In this case, for example, the State Department could have retrieved the notes of Mr. Kissinger's telephone conversations from the Library of Congress by an informal request or, if the Library was uncooperative, the initiation of legal proceedings. In view of the Library's willingness to comply with the order of the district court, it is hard to believe it would have resisted an assertion of ownership by the Department. In the event that the Library failed to comply, however, the Department would have had an enforceable property interest which entitled it to possession of the notes by legal compulsion if necessary.

More recently, in *Forsham* v. *Califano*, ____ F.2d ____, No. 76-1308 (July 11, 1978), the Court of Appeals for the District of Columbia Circuit held that documents which are outside an agency's physical custody will nevertheless be subject to the FOIA when there is "significant government control of day-by-day operation, or detailed involvement in the planning or execution" of the activities to which those documents relate. Slip Op., 21. While the court concluded that this test had not been met in the case before it, it stressed that the mere physical location of documents cannot determine whether the FOIA applies:

> "We do not suggest that mere physical possession of records by a government agency is the sole criterion for determining whether they fall within the scope of FOIA. Obviously, a government agency cannot circumvent FOIA by transferring physical possession of its records to a warehouse or like bailee." Slip Op., 16 n.20.

3. Applied here, these principles compel the conclusion that the notes of Mr. Kissinger's conversations are still subject to the FOIA if they remain State Department records in every respect except physical location. It is no bar to relief that the notes first must be returned to the agency that owns them before they can be processed for public disclosure under the Act. This Court has clearly established that a court enforcing the FOIA may invoke all of its equitable powers to enforce the public's rights to disclosure under the FOIA.

In *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974), three defense contractors engaged in renegotiation proceedings unsuccessfully sought disclosure

of certain documents from the Renegotiation Board. Relying on the Freedom of Information Act, they sued to enjoin renegotiation proceedings before the Board until the documents were produced. The Board argued that, under the FOIA, the only relief that a court could grant was to order the disclosure of withheld documents. This Court disagreed. It held that, in order to protect rights secured under the FOIA, the district courts may exercise their "inherent capacity to provide appropriate equitable relief."[16] 415 U.S. at 16-20.

If it is permissible to enjoin administrative proceedings to protect rights secured by the FOIA, then the District Court was certainly empowered to direct the Department of State to repossess documents that the Department lawfully owns and, but for their physical location, would clearly be subject to FOIA disclosure. If no such remedy were available, FOIA litigants would be forced to watch helplessly while government officials evaded public scrutiny by removing agency records from government property or transferring them to branches of the government to which the Act does not apply. Such a situation would plainly be incompatible with the objectives of the FOIA.

C. The Processing and Disclosure of the Notes Pursuant To The FOIA Will Not Violate Mr. Kissinger's Privacy Rights Under The Constitution

Mr. Kissinger also attacks the district court's decision on the ground that it unconstitutionally invades his privacy rights by requiring State Department records officers to obtain and review notes of conversations that concern personal matters. This argument, too, is insubstantial.

[16] It is widely recognized that *Bannercraft* provides authority for enjoining agency proceedings in the absence of compliance with the FOIA. *See, e.g.*, Goodfriend Western Corp. v. Fuchs, 411 F. Supp. 454 (D. Mass. 1976); United Telephone Company of Pennsylvania v. F.C.C., 375 F. Supp. 992 (M.D. Pa. 1974); Capital Cities Communications, Inc. v. N.L.R.B., 409 F. Supp. 971 (N.D. Cal. 1976).

As a record of Mr. Kissinger's telephone conversations during each working day, the notes relate predominantly to official business. Mr. Kissinger was an important government official with numerous responsibilities, and he undoubtedly devoted little official time to arranging his social life, communicating with his family or managing his finances. In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), this Court made it clear that "the public has a recognized interest" in documents which concern official business and such documents are not protected by any right of privacy. 433 U.S. at 459, 462.

As Mr. Kissinger points out, the District Court required the return of *all* the notes to the Department so Department records officers could separate those few notes that are purely personal from the vast majority that are official in nature.[17] However, *Nixon* conclusively establishes the legality of this procedure, too, in holding that GSA could take possession of the complete materials of Mr. Nixon's Presidency in order to separate personal from official documents:

> "Thus, the Act 'is a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of non-

[17] Mr. Kissinger objects to the District Court's Order on the ground that it requires the Department to repossess portions of the notes that relate to purely personal matters and makes no provision for the return of these materials to him. Petition, 26-27. At no time in this litigation, however, has Mr. Kissinger asked for this relief. Respondents have never sought disclosure of transcripts of purely personal conversations and would not object to a procedure which provides for the return of these transcripts to Mr. Kissinger after their review by State Department records officers.

> private documents and materials related to government objectives. The processing contemplated by the Act — at least as narrowed by carefully tailored regulations — represents the least intrusive manner in which to protect an adequate level of promotion of government interests of overriding importance.' *Id.*, at 367. We agree with the District Court that the Act does not unconstitutionally invade appellant's right of privacy." 433 U.S. at 456-57.

In this case, only review of the complete notes by Department records officers can assure that those portions which reflect official business are returned to the Department in their entirety.[18] Moreover, the archival screening of the notes required under the District Court's Order will safeguard Mr. Kissinger's privacy to the maximum extent possible. Before any portion of the notes can be disclosed to the public, they must be reviewed by Mr. Kissinger himself, who will then have an opportunity to enjoin their release under Exemption 6 of the FOIA, which forbids "clearly unwarranted invasions of personal privacy." Pet. App. 60a-61a. Thus, there is every reason to believe that the few portions of the notes that are purely personal will never be publicized outside of the narrow circle of State Department

[18] A similar procedure was also upheld by this Court in Department of Air Force v. Rose, 425 U.S. 352 (1976). That case involved an FOIA request for certain case summaries of honor and ethics hearings concerning cadets at the Air Force Academy. The Court agreed with the Air Force that "the disclosure of the summaries implicates . . . privacy values." 425 U.S. at 376. It therefore directed the district court to edit the case summaries to delete personal information — recognizing that this information would necessarily be disclosed to the district judge. To the objection that this disclosure would itself constitute an invasion of privacy, the Court responded that "the in camera procedure [ordered] will further the statutory goal of . . . a workable compromise between individual rights 'and the preservation of public rights to Government information.'" 425 U.S. at 381.

officials charged with reviewing them. Clearly, the resulting intrusion on Mr. Kissinger's privacy will be minimal and can easily pass muster under the Constitution.

CONCLUSION

Mr. Kissinger's petition for a writ of certiorari should be denied.

Respectfully submitted,

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